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No. 90-1747

Supreme Court, U.S.
FILED
JUN 12 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October term, 1990

FRED G. DAVIS, III,

Petitioner,

vs.

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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No. 90-1747

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FRED G. DAVIS, III,

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vs.

BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, BEXAR COUNTY SHERIFF'S CIVIL SERVICE COMMISSION, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, FRED G. DAVIS, III.

STATUTORY PROVISIONS

The Texas State Statutes which apply to this case are Tex. Loc. Gov't Code Ann. §§ 158.001-158.040 (Vernon 1988) & (Vernon Supp. 1991).

Petitioner alleges due process violations pursuant to the Fourteenth Amendment to the United States Constitution.

Respondent specifically alerts the Court to the application of Tex. Loc. Gov't Code Ann. § 158.009, which provides significant authority in support of the Respondent's decision to apply the reasoning in *Loudermill*. Section 158.009 outlines the scope of Respondent's powers and states in pertinent part:

> (b) The Commission may adopt or use as a guide any civil service law or rule of the United States, this state, or political subdivision in this state, to the extent that the law or rule promotes the purposes of this Subchapter, and serves the needs of the county.

Tex. Loc. Gov't Code Ann. § 158.009(b) (Vernon Supp. 1991).

STATEMENT

There are errors and omissions in Petitioner's Statement and paragraph on Jurisdiction. Petitioner's jurisdictional paragraph incorrectly invokes jurisdiction under 28 U.S.C. § 1257(3) (1966), which has been amended. Supreme Court Case Selections Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). Section 1257(a) contains essentially the same language as § 1257(3). 28 U.S.C. § 1257(a) (1991).

Petitioner's citation to Plaintiff's Exhibit No. 13 on page 2 of his Petition is incorrect because it is a September 16, 1985 Notice of Proposed Dismissal. Petitioner's

citation on page 2 of his Petition to S.F. Vol. II, p. 57, ll. 15-19, is also incorrect in that it is Petitioner's contradictory and inconsistent testimony that he was dismissed on September 26, 1985. Petitioner fails to support his statement on page 3 of his Petition with any reference to the record that he received an outstanding job performance evaluation on July 1, 1985. Respondent argues that the evaluation is irrelevant to the due process issue before this Court.

Petitioner's citation to S.F. Vol. II, p. 120, ll. 2-16 on page 3 of his Petition does not support his contention that Debbie Brown Windler was never an employee of the Sheriff's Office. Petitioner is incorrect in stating that the Notice of Proposed Dismissal, Plaintiff's Exhibit 13, and the Order of Dismissal, Plaintiff's Exhibit 6, did not contain any dates or specific places of occurrence. The Notice of Proposed Dismissal states:

> (1) The specific ground under which Petitioner was being dismissed – (I) sexual harassment; (O) conduct or action that would seriously impair job effectiveness; and (P) conduct which has proven to be detrimental or has an adverse affect (sic) on the Department;
>
> (2) The specific rule – 9.02, of the Bexar County Sheriff's Civil Service Commission Rules;
>
> (3) The specific facts supporting the allegations – Petitioner's association with former Deputy Sheriff Alvin Johnson and sexual encounters with Debbie Brown Windler and other female employees in his office between 1982 and 1983 and specifically as recent as September 13, 1985.

See Appendix, Notice of Proposed Dismissal.

This same information in the Notice was repeated in the Order of Dismissal. *See* Appendix, Order of Dismissal. The Petitioner's citation to S.F. Vol. II, p. 122, ll. 5-19 on page 3 of his Petition is his contradictory testimony that after reviewing the Order of Dismissal and Notice of Proposed Dismissal, the documents failed to include the referenced information.

Petitioner is correct on page 3 of his Petition that Plaintiff's Exhibit No. 3 is a specific refusal to provide pretrial discovery, but he fails to discuss the remaining portion of Sheriff Harlon Copeland's response to Petitioner's attorneys stating that there is no provision for "pre-trail discovery" [sic] in the administrative process in that the information requested will be made available through the offering of evidence by live witnesses at the Commission hearing.

Petitioner's citation to S.F. Vol. II, p. 127, l. 1 on page 3 of his Petition is evidence only that he was not provided with a copy of the statement purportedly made by Debbie Brown Windler.

Petitioner's statement on page 4 of his Petition, that the Notice of Proposed Dismissal and Order of Dismissal contain no mention of sexual harassment concerning Debbie Brown Windler is untrue. Plaintiff's Exhibit No. 6 and 13, the Order of Dismissal and Notice of Proposed Dismissal, state in part:

> 1. While employed as a captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie

> Brown Windler in your office in the Bexar County Courthouse during regular duty hours.
>
> Your sexual endeavors have continued over the years, in that on several occasions, they extended to on-duty female department employees.

See Appendix.

Petitioner's citation to S.F. Vol. II, p. 137, ll. 18-22, on page 4 of his Petition is to his self-serving testimony that he finds no reference to sexual harassment of Debbie Brown Windler from his review of the Notice of Proposed Dismissal and Order of Dismissal. References to the statement of facts by Petitioner on page 4, paragraph 2 of his Petition, are additional self-serving interpretations of what is evident on the face of Plaintiff's Exhibits 6 and 13.

Petitioner's conclusion on page 4 of his Petition that he should have been allowed "pre-termination notice of the names and an evidentiary discussion in the Notice of Proposed Dismissal, and prior to the post-termination hearing should have had access to the statements" because Plaintiff's Exhibits 6 and 13 reflect that several female employees of the Sheriff's Department had officially filed written sworn statements concerning sexual harassment, is legally unjustified as determined by the Texas Supreme Court.

Respondent objects to paragraph 5, on page 5 of his Petition where Petitioner states that the Notice of Proposed Dismissal and the Order of Dismissal do not contain the names of any of the employer's accusing witnesses. The Notice and Order contain the name of Debbie Brown Windler who, although not a witness at the Commission hearing, was a person whose personal

knowledge could support the Sheriff's Department's decision to consider termination.

Petitioner's allegations in paragraph 6, pages 5 and 6 of his Petition, are conclusions and without support in the record. The Texas Supreme Court's holding that the notice provided to Petitioner satisfied all statutory and administrative requirements has never been successfully refuted by any evidence in the record. Respondent's response form, attached as Appendix C to the Petition, clearly was not in effect at the time of the original October 22, 1985, setting for Petitioner's post-termination hearing. *See* S.F. Vol. I, from the Commission's hearing, p. 66, ll. 4-25, p. 67, ll. 1-19. Furthermore, counsel for Petitioner was reminded that the documents, along with other information that Petitioner thought was discoverable prior to the hearing, were Internal Affairs' documents of the Bexar County District Attorney's Office or were documents affecting internal operating procedures, which are not required to be made available to Petitioner. *See* S.F. Vol. I, p. 129, ll. 1-13; p. 13, ll. 2-25, p. 14, ll. 1-9.

Contrary to Petitioner's statement on page 6 of his Petition, the Texas Supreme Court's opinion is correct in stating that Petitioner failed to request a continuance during the post-termination hearing. The record of the Commission hearing also states that *prior* to the start of the original post-termination hearing of October 22, 1985, Petitioner requested resets to November 19, 1985, December 17, 1985, and finally December 23, 1985. *See* S.F. Vol. I from the Commission hearing, p. 13, ll. 12-22.

Petitioner fails to mention to this Court that his attorneys submitted a letter to the Bexar County District

Attorney's Office requesting that thirty-five (35) witnesses be available. *See* S.F. Vol. I from the Commission hearing, p. 20, ll. 3-20.

The record reflects that Petitioner was present at the hearing, saw and heard the witnesses against him, was represented by three (3) attorneys from the time of his receipt of the Notice of Proposed Dismissal through the filing of his Petition with this Court, and he has had notice of who the witnesses were and what they maintained before he was required to place his case-in-chief before the Commission. Petitioner's constitutional rights of confrontation and due process have been satisfied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petition should be denied for the following reasons:

1. PETITIONER PRESENTS AN INSUBSTANTIAL FEDERAL QUESTION BECAUSE THE DECISION BY THE TEXAS SUPREME COURT IS CONSISTENT WITH THIS COURT'S DECISION IN *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985), THE FIFTH CIRCUIT'S DECISION IN *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986), AND LOWER FEDERAL COURT DECISIONS RELIED ON BY PETITIONER.

A. Notice of Accusers Prior to Termination or Prior to a Post-Termination Hearing.

The narrow issue of whether notice of an accuser has been properly provided to an employee has been

addressed in *Wells v. Dallas Independent School Dist.*, 793 F.2d 679 (5th Cir. 1986). In *Wells*, the Fifth Circuit reviewed an assistant superintendent's action against a school district. The employee claimed that his 14th Amendment due process rights had been violated by his summary dismissal. The U.S. District Court entered judgment on a jury verdict for the employee and granted partial summary judgment in favor of the school district. The Fifth Circuit vacated the District Court's judgment and remanded the case. On the issue of notice, the Court held:

> When an administrative termination hearing is required, federal constitutional due process demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. *One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied.* It is only when he was not present when they were heard that such measures are called for as found in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).[1] When, as here, the adjudicator acts on the sole basis of testimony produced at a hearing at which the accused is present, then by the time the accused must present his case he has necessarily already heard the witnesses' names and substance of their

---

[1] The individual is entitled to receive the names of the witnesses, an oral or written report on the facts to which each witness will testify, an opportunity to present his own defense to charges, and an opportunity to produce oral testimony or written affidavits. *See Dixon*, 294 F.2d at 159.

> testimony. The authorities upon which Mr. Wells relies to demand names and summaries of testimony in advance *plus* confrontation are cases in which there was no confrontation and we required the other as a substitute. *Dixon, supra; Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). Any charged person is constitutionally entitled once to be told what he is charged with and on what evidence; none is entitled to be told so twice. To so require would be to impose on the state administrative proceedings a higher standard than the constitution requires for criminal trials. *Cf. Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 846, 51 L.Ed.2d 30 (1977). This we have never done.

Wells, 793 F.2d at 683 (emphasis added).

In applying *Wells* to the case at bar, the record reflects that Petitioner was present, that he saw and heard the witnesses against him, that he was represented by counsel and that he had notice of the identity of the witnesses and their testimony before he placed his case-in-chief before the Commission. Petitioner's constitutional right of confrontation was satisfied. Had Petitioner not been present at the post-termination hearing, he would have been entitled to a reasonable substitute for that opportunity to confront the witnesses against him. When the adjudicator acts on the sole basis of testimony produced at a hearing in which the discharged employee is present, the former employee's constitutional right of due process is satisfied once he has had an opportunity to hear the witnesses' names, the substance of their testimony, and perform cross-examination.

B. The Notice of Proposed Dismissal.

Civil service hearings are not subject to the stringency of the criminal law and a general charge supported by specific acts is a suitable procedure for a profession which demands a state of readiness, strict discipline, and a measure of obedience and valor not expected in ordinary callings. *Bolieu v. Firemen's & Policemen's Civil Service Com'n*, 330 S.W.2d 234, 236 (Tex. Civ. App. – San Antonio 1959, writ ref'd n.r.e.).

A letter of suspension listing the specific rules allegedly violated and followed by a statement of facts in support of the allegations will be upheld. *Firemen's and Policemen's Etc. v. Lockhart*, 626 S.W.2d 492, 494 (Tex. 1981); *See Nixon v. City of Houston*, 560 S.W.2d 447, 450 (Tex. Civ. App. – Houston [14th Dist.] 1977, writ ref'd n.r.e.). As the Court in *Lockhart* held:

> A common thread running through the above referenced cases is that substantial compliance is had with the requirement of article 1269m where the letter of suspension sufficiently apprises the officer of the charges against him and the facts relied upon to prove those charges. The courts recognize that this is a civil action administered by laymen and the charges need not meet the precision or technicality of a criminal indictment.

Lockhart, 626 S.W.2d at 494; *Firemen's & Policemen's Civ. Ser. v. Martinez*, 645 S.W.2d 431, 432 (Tex. 1983).

Petitioner attempts to apply a criminal law standard of procedural due process to an administrative proceeding. The record is replete with examples of the efforts by Petitioner's attorneys to apply this standard without justification:

1) Mr. Butts: " . . . And we respectfully suggest to the Commission that this deprives Captain Davis of due process and the very requirements under the law that a person will be placed on notice of his accusers." (S.F. Vol. I, p. 9, ll. 4-7).

2) Mr. Butts: "Now it is fundamental in our law that a person is entitled to be made aware of who his accusers are, that he be made aware of the specific allegations against him; the names of the witnesses, as called for in the sheriff's response forms; what they specifically allege against them; when, where, and under what circumstances the events are alleged to occur.

This is specifically enunciated in the Texas Code of Criminal Procedure, Chapter 21. And, although this may not be per se a criminal proceeding, it is certainly quasi-criminal and I feel that the – the Constitution and the laws that apply to criminal cases in some regards . . . "

Ms. McNair: "I would –"

Mr. Butts: " . . . would apply."

Ms. McNair: " . . . object just to cut this a little bit short and the fact that I don't think we need to hear anything about criminal rights or the protection of criminal rights in that I don't think this is a criminal case and certainly not applies to criminal."

Mr. Butts: "He is charged by shotgun allegation of matters that could be considered to be criminal nature; assault, for instance."

Ms. McNair: "This committee, Commission, is not hearing anything on a criminal nature." (S.F. Vol. I, p. 10, ll. 21-25, p. 11, ll. 1-22).

Other pertinent examples exist in the record: (S.F. Vol. I, p. 23, ll. 5-14 on lack of notice); (S.F. Vol. I, p. 63, ll. 22-25, p. 64, ll. 1-2 on investigatory statements not before the

Commission at the hearing); (S.F. Vol. I, p. 67, ll. 24-25 where Mr. Butts stated, "I'm endeavoring to represent a client whose very life is at stake before this Commission."). There is no support in case law or statute for the application of a criminal law standard to an administrative proceeding. No case law or constitutional interpretation supports Petitioner's extension of the Fourteenth Amendment to the U.S. Constitution.

The record reflects that Respondent considered only the evidence presented at the hearing. *See* S.F. Vol. I, p. 4, ll. 16-25, from the Commission hearing. There is no evidence that Respondent received any new evidence prior to the hearing. Absent such evidence, there is no taint of illegality which would, in turn, destroy the presumption of validity of the Respondent's order to uphold the termination. *See Firemen's and Policemen's Civil Serv. Com'n v. Hamman*, 404 S.W.2d 308, 312 (Tex. 1966). It was within the Respondent's discretion to believe those complainants who testified in determining whether Davis was in violation of the local civil service rules. *Firemen's & Policemen's Civil Ser. v. Bonds*, 666 S.W.2d 242, 244-245 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

C. Applying Loudermill.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-548, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985), the U.S. Supreme Court held that tenured public employees are entitled to a pre-termination hearing. The Court reaffirmed an essential principle of due process that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of

the case."[2] *Loudermill*, 470 U.S. at 542, *citing*, *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865 (1950). The Court reasoned that all the process that is due is provided by a pre-termination opportunity to respond, coupled with post-termination procedures as provided by state statute. *Loudermill*, 470 U.S. at 547-548. The opportunity to present reasons, either in person or in writing, why proposed actions should not be taken is a fundamental due process requirement. *Loudermill*, 470 U.S. at 546. The Court in *Loudermill* stated that the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story. *Loudermill*, 470 U.S. at 546, *citing*, *Arnett*,

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[2] It is well established that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). Whether an administrative procedure is constitutionally sufficient requires an analysis of the governmental and private interests that are affected. *Morrissey v. Brewer*, 408 U.S. at 481.

The Respondent's rules rise to an expectation of continued employment that are sufficient to constitute a property interest. *See Bueno v. City of Donna*, 714 F.2d 484, 492 (5th Cir. 1983). Since Petitioner was not employed at will, he had a property interest in continued employment that is entitled to constitutional protection. *See Arnett v. Kennedy*, 416 U.S. 134, 166, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974).

416 U.S. at 170-171. The Court specifically reasoned that to require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. *Loudermill*, 470 U.S. at 546. Finally, the Court held that the pre-termination hearing need not definitively resolve the propriety of the discharge, but rather it should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. *Loudermill*, 470 U.S. at 545-546, *citing*, *Bell v. Burson*, 402 U.S. 535, 540, 91 S. Ct. 1586, 29 L.Ed.2d 90 (1971).

Petitioner received notice of the general charges of sexual harassment and detrimental conduct (Tr. P. Exh. 13; *See* Appendix). More importantly, he was informed of the specific acts with Debbie Brown Windler and the specific acts with other female employees. *See* Appendix. Petitioner was provided with a meaningful opportunity to present his side of the factual dispute after receiving written notice of the alleged violations. Plaintiff's Exhibit No. 13 contains: (1) the specific allegations of sexual misconduct directed toward female employees of the Sheriff's Department; (2) the place of the occurrence, the Bexar County Sheriff's Office; and (3) the manner and means of the sexual harassment, verbally and physically. Petitioner denied the allegations in the notice, but provided no evidence to dissuade the decision maker that the allegations were false. *See* Appendix. This notice satisfied the requirement in *Loudermill* that this stage be an *initial check* to determine if reasonable grounds exist to believe the charges against the employee were true and

support the proposed action. *Loudermill*, 470 U.S. at 545-546.

D. The Government's Interest.

The standards of procedural due process are not wooden absolutes. *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). The sufficiency of procedures employed in any particular situation must be judged in light of the parties, the subject matter, and the circumstances involved. *Id.* The record is clear that Petitioner's removal was based on serious allegations which embodied the overriding governmental interest of removing an employee who presents a significant hazard. *See* Appendix. Respondent afforded Petitioner a three-day opportunity to respond to the allegations, and, since it was determined that he was a significant hazard, he was suspended without pay. *See Loudermill*, 470 U.S. at 544-545; *See* Appendix.

Furthermore, the Government's interest in quickly removing a hazardous employee reinforces the public's interest in the maintenance of employee efficiency and discipline. *Arnett*, 416 U.S. at 168, n.4. This Court has recognized that suspension without pay imposes an additional financial burden on the Government, inhibits warranted discharges, significantly weakens the deterrent effect of immediate removal, and creates a strong incentive for the suspended employee to attempt to delay final resolution of the issues surrounding his discharge. *Arnett*, 416 U.S. at 168-169, n.4. The latter is particularly true in the instant case where Petitioner alleged in his Appellant's Brief to the Texas Court of Appeals for the Fourth

Supreme Judicial District, that he had a right to inspect documents and statements, that he had a right to know the identity of witnesses and his accusers, and that he had a right to be present at any investigatory interviews *prior* to the filing of charges against him by the Sheriff's Department. *See* Appendix, Points of Error.

Petitioner's allegation on page 10 of his Petition, that the Bexar County Sheriff's Department failed to assert a confidentiality interest in this case, is attributable only to Petitioner's failure to join the Sheriff's Department as a party. The six (6) year delay in the finality of Petitioner's termination is evidence enough of the Government's interest in quickly resolving administrative discharges. *See Arnett,* 416 U.S. at 168-169, n.4.

E. The Petitioner's Minority Argument.

Petitioner's argument that he should be provided with notice of his accusers, so that he may contest their statements, was properly addressed by the U.S. Supreme Court in the concurring opinion of Justice Marshall in *Loudermill.* While concurring in the judgment, Justice Marshall reaffirmed his *dissent* in *Arnett.* Justice Marshall concluded:

> I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause, of the Fourteenth Amendment, to more than respondent sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages,* the employee is entitled to an opportunity to test the strength of the evidence "by confronting and

> cross-examining adverse witnesses and by presenting witnesses on [their] own behalf, whenever there are substantial disputes in testimonial evidence," *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed.2d 15, 94 S. Ct. 1633 (1974) (Marshall, J, dissenting). Because the court suggests that even in this situation due process requires no more than notice and an opportunity to be heard before wages are cut off, I am not able to join the court's opinion in its entirety.

Loudermill, 470 U.S. at 548.

It is this dicta in the *Loudermill* opinion which best exemplifies the minority position advanced by Petitioner.

In their *dissent* in *Arnett*, Justices Marshall, Douglas and Brennan recognized that the purpose of the Notice of Proposed Dismissal is as a limited check into the reasonableness of the charge:

> In most agencies, . . . an employee's right to reply simply means that he may meet informally with a representative of the agency and advance oral representations that he hopes will sway the final decision. He has no right at this stage to present witnesses or to confront and cross-examine the agency's witnesses. (Footnotes omitted.) (*Citing* Merrill, Report in Support of Recommendation, 72-8, Procedures for Adverse Actions Against Federal Employees, in No. 2 Recommendations and Reports of the Administrative Conference of the United States 1007, 1015, 1033 (1972).

See Arnett, 416 U.S. at 226.

Concurring in part and concurring in the result in part of the main opinion in *Arnett*, Justice Powell and Justice Blackmun described the termination procedure:

> . . . the affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded back pay if reinstated. (Citations omitted.) These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful.
>
> On balance, I would conclude that a prior evidentiary hearing is not required and that the present statute and regulations comport with due process by providing a reasonable accommodation of the competing interests.

Arnett, 416 U.S. at 170-171.

The U.S. Supreme Court decision in *Loudermill* and the decision of the Fifth Circuit in *Wells* dispose of the issue before this Court. An employee is not deprived of a Constitutionally protected property right when notice of the identity of his accusers is deprived at the initial check stage for the reasonableness of the allegation so long as he is provided notice of his accusers and notice of their testimony at an evidentiary hearing. The strictness of the due process standard in a criminal matter does not apply to the discharge of government employees. The due process accorded to Petitioner by the Respondent comported

with the reasonableness of sustaining the government's interest in removing a hazardous employee balanced with the requirements of the U.S. Constitution in protecting Petitioner's right to continued employment.

F. Applying Goldberg.

This Court has considered whether the reasoning in *Goldberg v. Kelly*, 397 U.S. 254, 264, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970) should be applied in the factual context of the discharged government employee.

This Court used the following language in describing the unique position of welfare recipients:

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. (cite omitted). Thus, the crucial factor in this context – a factor not present in the case of the blacklisted government contractor, *the discharged government employee*, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended – is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

Goldberg, 397 U.S. at 264 (emphasis added). Because of the class of people affected, this Court reasoned:

> In the present context these principles require that a recipient have timely and adequate notice detailing reasons for a proposed termination,

> and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg, 397 U.S. at 267-268.

This Court recognized in *Goldberg* that it was important *NOT* to impose upon the States or Federal Government any procedural requirements beyond those demanded by rudimentary due process. *Goldberg*, 397 U.S. at 267. Respondent concludes that the peculiar facts of *Goldberg* required a full evidentiary hearing as a rudiment of due process. In *Loudermill*, the Court has resolved the issues at bar by holding that notice and the opportunity to respond are sufficient. *Loudermill*, 470 U.S. at 546. Respondent argues that the rudiments of due process were properly followed to protect Petitioner's property interest in continued employment.

G. Pre-Termination Discovery/Post-Termination Hearing Discovery.

Petitioner was not entitled to "pretrial" discovery of the Bexar County Sheriff's Internal Affairs' investigative file. *Moore v. Administrator, Veterans Administration*, 475 F.2d 1283, 1286 (D.C. Cir. 1973). While an employee has a right to be informed of and examine the evidence upon which the charges are based, the employee has no right to discover investigative material which was not introduced as evidence to support the dismissal. *Id.* Pretrial discovery in the formal sense is not appropriate in an administrative hearing. *Id.* The investigative materials requested by Petitioner were not presented to the Respondent at the post-termination hearing. The Respondent's decision to

uphold termination was based on information received at the hearing. *See* S.F., Vol. I, p. 4, ll. 16-25, from the Commission hearing. Since witnesses were subject to cross-examination, Petitioner received all the process that was due.

H. Decisions by Lower Federal Courts.

Petitioner's references to numerous lower federal court decisions allegedly in conflict with the decision by the Texas Supreme Court in the instant case are cited out of context.

None of the teacher termination or pupil suspension cases cited by Petitioner can be stretched to the constitutional proportions present in *Arnett* because they fail to terminate for "cause," as in the instant case, as established by Respondent's rules. *See Goss v. Lopez*, 419 U.S. 565, 587, n.4, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975).

Petitioner states that the decisions in *Hatcher v. Board of Public Education and Orphanage*, 809 F.2d 1546, 1554 (11th Cir. 1987) and the *Tolson v. Scheridan School Dist.*, 703 F. Supp. 766, 772 (E.D. Ark. 1988), are in conflict with the Texas Supreme Court's decision in the instant case.

In *Hatcher*, an elementary school principal was displaced by the closing of a school. *Hatcher*, 809 F.2d at 1546. The Eleventh Circuit in *Hatcher* explicitly distinguished constitutional due process analysis applied in other fact situations as inapplicable, including public employee termination cases. *See Hatcher*, 809 F.2d at 1552, n.16, *citing, Kelly v. Smith*, 764 F.2d 1412 (11th Cir. 1985)

(discharged city utility worker); *Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982) (layoff of city employee); *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980) (dismissal of city police officer, in which the Fifth Circuit *rejected* Glenn's argument that he was not advised of the names of adverse witnesses or the nature of their testimony). The Eleventh Circuit in *Hatcher* explicitly held:

> Our analysis of the due process requirements is limited to the special circumstances of this case: where a tenured teacher had a constitutional property interest in continued comparable employment and was demoted as a result of the elimination of her position.

Hatcher, 809 F.2d at 1553. The *Hatcher* case is inapplicable to the facts in the case at bar.

In *Tolson*, the plaintiff was discharged with no hearing whatsoever and the Court concluded that his due process rights were violated. *Tolson*, 703 F. Supp. at 771-772. The Court further concluded that after Tolson's termination, he was not given an oral or written notice of the specific charges against him, an explanation of the employer's evidence, or an opportunity to present his side of the story. *Id.* at 772. The Court concluded that the total lack of pre-termination procedure is especially grievous because the post-termination procedures were also inadequate under the due process clause. *Id.* The Court further held that regardless of whether pre-termination proceedings are adequate, the equivalent of a full evidentiary hearing is necessary *either* pre- or post-termination in order to meet the demands of due process. *Id.* (emphasis added). Petitioner received pre-termination notice of proposed dismissal, opportunity to respond, a

post-termination hearing, a trial *de novo* in District Court, appeals to the Court of Appeals, Texas Supreme Court and now this Court. The facts in the instant case are so distinguishable from the case in *Tolson* as to render the holding in *Tolson* completely inapplicable.

The Petitioner cites *Levitt v. University of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), on page 18 of his Petition for the proposition that pre-hearing identification of complainants is a minimal due process requirement. Once again, Petitioner fails to properly consider the reasoning in the case. The Fifth Circuit in *Levitt*, in applying the reasoning in *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), held that certain minimum standards describe the *boundaries* within which *the state* has *discretion* to adopt the procedures it finds most appropriate. *Id.* at 1228 (emphasis added). In the *Levitt* fact situation, these boundaries include the right of a professor to: . . . (2) be advised of the names and the nature of the testimony of the witnesses against; . . . *Id.* at 1228. The Court in *Levitt* also held that the additions to the "constitutional minimum" referred to in *Ferguson* arise only when the procedures promised are denied in such a manner that the constitutional minimum is itself denied or an independent constitutional deprivation is effected. *Id.* at 1230. The Court reasoned that if a university promised its faculty that it would provide professors two (2) opportunities to challenge a decision of termination, and that if the university deprived the professor of the first opportunity, it could not deprive him of the second opportunity without violating due process. *Id.* at 1230. In the case at bar, Davis was provided multiple opportunities.

Further, Petitioner's allegation that Respondent violated its own rules in not providing its internal response form to Petitioner is untrue and irrelevant. *See* Appendix C to Petition. As mentioned in the Statement of this Brief, the form was an internal memorandum unavailable at the time of the initial setting of the hearing. Respondent had no duty to produce the response form prior to the post-termination hearing. *Moore,* 475 F.2d at 1286 (pretrial discovery is inappropriate in an administrative hearing); *Hamman,* 404 S.W.2d at 312 (Commission must consider only the evidence presented at the hearing); *Levitt,* 759 F.2d at 1230 (there is no violation of due process every time a government entity violates its own rules; the action must trespass federal constitutional safeguards for there to be a constitutional deprivation). The Texas Supreme Court decision is consistent with the holding in *Levitt.*

Petitioner cites *Brouillette v. Board of Dir. of Merged Area IX Etc.,* 519 F.2d 126 (8th Cir. 1975) in support of his allegation that minimal due process requirements were not met when he was not provided the names of his accusers. In *Brouillette,* the Court considered the discharge of a nontenured community college teacher pursuant to an Iowa statute which did not provide for any form of a required hearing after termination. *Id.* at 128. The Court held that:

> In the absence of more specific rules and regulations or until further definition by the Iowa Supreme Court, we deem an informal procedure which meets the minimal requirements of fair play and provides a dismissed teacher with a reasonable opportunity to be heard compliance [sic] with the statute. *Id.*

The Court held that due process required disclosure of the names of those who have made allegations in the absence of rules. *Id.* The case at bar has proceeded pursuant to Respondent's rules, state statute and case law, all of which provide for a post-termination hearing and further appellate review. The decision in *Brouillette* is inapplicable to the instant case.

Petitioner also cites *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8th Cir. 1986) as further support that he was denied minimal due process. In *Agarwal*, a former professor brought an action challenging his termination. After reciting the minimal due process requirements for a teacher in a termination case, which include notice of the names of those who have made allegations against the teacher, the Eighth Circuit specifically held:

> These requirements of procedural due process *clearly do not necessitate* that Agarwal received notice of an opportunity to remedy his deficiency or that he be made aware of the possible uses of student evaluation survey data.
>
> Moreover, the record indicates that Agarwal was accorded all the process he was due under these requirements in the instant case. Agarwal received prior notice of the charges against him and was represented by counsel on all subsequent proceedings. Further, during the hearings before the judicial committee and the board of regents, he took full advantage of his rights to present evidence, to call and cross-examine witnesses. Finally, that the full formal procedural safeguards of the 14th Amendment may not have been observed during the proceedings of the initial French Committee, does not establish that Agarwal's right to procedural due process

> was violated in light of the formality of the later hearings. In sum, Agarwal's due process claims lacked any legal merit.

Id. at 508. *Agarwal* does not support Petitioner's position in the instant case and, like the reasoning in *Levitt*, is more suppo-tive of Respondent's actions to protect Petitioner's due process rights.

None of the lower federal court decisions cited by Petitioner conflict with the Texas Supreme Court's decision involving the discharge of a public employee.

CONCLUSION

This Court should deny the Petition for Certiorari because it involves an insubstantial question which is "wholly formal, . . . so absolutely devoid of merit as to be frivolous, . . . so explicitly foreclosed by decision or decisions of this Court as to leave no room for real controversy." *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902). Petitioner has been afforded a Notice of Proposed Dismissal, opportunity to respond, effective counsel from three (3) attorneys, cross-examination of complainants, presentation of his case-in-chief through the testimony of eighteen (18) witnesses, a post-termination hearing that satisfied his right of confrontation, a trial *de novo* to a Texas District Court, and appeals to a Texas Court of Appeals and the Texas Supreme Court.

Petitioner alleges that he should have been provided with the names of his accusers prior to his termination and prior to his post-termination hearing for discovery

purposes. Petitioner's allegation is "so wanting in substance as to need no further argument," and requires "no analysis [or] exposition for the decision by Respondent to deny Petitioner access to this information." *Milheim v. Moffat Tunnel Dist.*, 262 U.S. 710, 716-717, 43 S. Ct. 694, 67 L.Ed. 1194 (1923); *see Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L.Ed. 194 (1922); *See King v. Priest*, 206 S.W.2d 547, 551 (Mo. 1947), *appeal dismissed*, 333 U.S. 852 (1948).

Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

1. Notice of Proposed Dismissal (Plaintiff's Exhibit No. 13 in the Trial Transcript).....App. 1

2. Order of Dismissal (Plaintiff's Exhibit No. 6 in the Trial Transcript).....App. 4

3. Petitioner's Points of Error from Brief to Court of Appeals For the Fourth Supreme Judicial District.....App. 7

APPENDIX 1

OFFICE OF
HARLON COPELAND, SHERIFF

(seal)

BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

NOTICE OF PROPOSED DISMISSAL

TO: Fred G. Davis
Captain

DATE: September 16, 1985

You are hereby notified that the Bexar County Sheriff's Department proposes to dismiss you from the position of Captain for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment

O. Conduct or action that would seriously impair job effectiveness

P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

   Your sexual endeavors have continued over the years, in that on several occasions, they

extended to on-duty female Department employees.

Several female employees have officially filed written sworn statements wherein they describe their feeling of being sexually harassed and intimidated by you during regular working hours at the Bexar County Courthouse. These complaints, which relate to the past several years, and as recent as 9-13-85, indicate an on-going pattern of sexual accosting on your part, described as patting, rubbing, grabbing and/or fondling the buttocks, breasts and other parts of the female employees anatomy, and importing certain sexual inuendos to them including explaining what a good time you could have in bed together, what you could do to them in bed, and that you could eat them up all over. Fear of retaliation prevented these female employees from making this information known prior to this time, noting their belief of support you might receive from the prior administration and the fact that you serve in a high supervisory position over them.

You may respond in writing and/or orally to the undersigned, explaining or countervailing said specific charges. Said response must be made within three (3) working days after service of this Notice upon you.

You are hereby placed on Administrative Leave without pay as of the date you receive this Notice. This status will continue until a review of your response has been

made and a further decision on your status has been determined.

/s/ Harlon Copeland
Harlon Copeland
Sheriff

HC:js

cc: Personnel
Adm File

The foregoing Notice of Proposed Dismissal was served upon Fred G. Davis on the 17th day of September 1985 by:

/s/ illegible
employee's signature

APPENDIX 2

OFFICE OF
HARLON COPELAND, SHERIFF
(seal)
BEXAR COUNTY
SAN ANTONIO, TEXAS 78205-3061

ORDER OF DISMISSAL

TO: Fred G. Davis

DATE: September 23, 1985

You are hereby notified that the Bexar County Sheriff's Department is dismissing you from the position of Captain effective September 23, 1985 for violation of the following subsections of Section 9.02 of the Bexar County Sheriff's Department Civil Service Rules:

I. Sexual Harassment

O. Conduct or action that would seriously impair job effectiveness

P. Conduct which has proven to be detrimental or has an adverse affect on the Department.

Specifically, the reasons for this action are:

1. While employed as a Captain in the Criminal Investigation Division, and between the dates of generally 1982 through 1983, your association with former Deputy Sheriff Alvin Johnson led to numerous sexual encounters with one Debbie Brown Windler in your office in the Bexar County Courthouse during regular duty hours.

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You were served the Notice of Proposed Dismissal on 17 September 1985. Your rights to respond were explained in that Notice. You did respond, both verbally and in writing however, I will not modify my decision.

You are further advised that you may Appeal this Order, in writing, to the Civil Service Commission at 200 Main Plaza, Suite 404, San Antonio, Texas, 78205, within five (5) working days of receipt of this Order. Send a copy of your written appeal to the Personnel Section of the

Bexar County Sheriff's Department. Any further information regarding your Civil Service rights may be obtained at the Civil Service Office.

/s/ Harlon Copeland
Harlon Copeland
Sheriff

HC:js

cc: Personnel
Admin File

The foregoing Order of Dismissal was served upon Fred G. Davis on the 23 day of September 1985,

by: /s/ illegible

/s/ S/ F.G.D.
Employee's Signature

APPENDIX 3

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